IN THE SUPREME COURT OF FLORIDA

SC20-1282

JOSHUA DAVIS
Petitioner,

v.

STATE OF FLORIDA
Respondent.

On Discretionary Review from the District Court
of Appeal of the State of Florida, Second District
DCA No.: 2D17-517

PETITIONER'S REPLY BRIEF ON THE MERITS

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A. Standards for reversal on direct appeal.

The State closes its brief by claiming "[u]nder any of the harmless error formulations discussed above, the State would prevail." State's Brief ("SB"). 49. Davis firmly disagrees. The *Thompson*, *Fulminante*, *DiGuilio*, and *Liljeberg* analyses (all cited and discussed *infra*) each require reversal for a new trial. Reversal can be avoided, if it all, only under the so-called "fair-trial-before-a-neutral-judge" standard (SB. 3,46,49) invented out of whole cloth by the Second DCA panel, and one does not have to read too far between the lines to perceive that reversal was denied in order to penalize Davis for his attorneys' decision to raise the disqualification issue on direct appeal (a choice which was open to Davis under existing law) rather than by writ of prohibition, and to coerce attorneys in future cases to "choose" the writ option. App'x. 12-14,27-28.

Davis is of course entitled to a new trial if the disqualification error is structural, or if this Court adheres to its considered rationale in *Thompson v. State*, 990 So. 2d 482 (Fla. 2008), distinguishing between cases where a judge's erroneous refusal to disqualify himself

is raised on direct appeal (per se reversal) or by post-conviction motion claiming ineffective assistance of counsel (requiring a showing of actual prejudice). If, on the other hand, a harmless error test is employed the well-established benchmark[1] standard of *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986), requires the State, as the beneficiary of the error (and as the party who – as the DCA panel recognized – caused or at least exacerbated the disqualification error through her "over-the-top" and successful effort at judge shopping[2]) to show beyond a reasonable doubt that the error could not have contributed to the outcome of the case. The State cannot make, and has not even tried to make, such a showing.

Then there is the formulation used by federal courts and many states arising from *Liljeberg v. Health Svcs. Acq. Corp.*, 486 U.S. 847 (1988). *Liljeberg* has been on the books for thirty-two years; it preceded this Court's decision in *Thompson* by twenty years, and it has never been followed in Florida.[3] The DCA panel in the instant

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[1] *Rodriguez v. State*, 248 So. 3d 1085,1086 (Fla. 2018).

[2] App'x. 3-5,10,31.

[3] Other than the DCA opinion below, which declined to adopt the

case expressly declined to adopt the *Liljeberg* test (App'x. 24)[4] and the State has made a point of asking this Court not to adopt it either (SB. 47-49). Nor does Davis favor adoption of the *Liljeberg* test, since *Thompson* and *DiGuilio* more than adequately vindicate a litigant's right not to be tried before a judge who should have disqualified himself. But even if *Liljeberg* were applied, Davis – not the State – would prevail, in light of the multiple discretionary rulings made by Judge Harb in this trial (which was a closely contested battle-of-the-experts on the issue of insanity), and in light of the prosecutor's deliberate actions designed to keep Judge Harb on the case. *See United States v. Orr*, 969 F.3d 732,738-42 (7th Cir. 2020) and *Goldfarb v. Solimine*, 213 A.3d 200 (N.J. App. Div. 2019) (both discussed *infra*).

The State's contention that this Court should not adopt

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federal test, *Liljeberg* has been mentioned only once in a Florida appellate opinion; in *Brown v. State*, 885 So. 2d 391,392-93 (Fla. 5th DCA 2004), which cited it not for its harmless error test, but for the proposition that the trial judge appropriately recused himself in order to retain public confidence in the impartiality of the judiciary.

[4] Nor was the DCA panel free to adopt a test – whether *Liljeberg* or its preferred "fair trial" formulation – inconsistent with *DiGuilio* and *Thompson*. *See Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973).

Liljeberg – with which Davis agrees but emphatically not for the reason given by the State – is based on the demonstrably wrong premise that the Second DCA panel's burden-shifting "fair trial" test somehow comes closer to *DiGuilio*. SB. 47. It does not. In fact, it misses by a country mile. *See, e.g., Williams v. State*, 863 So. 2d 1189 (Fla. 2003) (if reviewing court cannot determine beyond a reasonable doubt that the error did not affect the verdict then the error is by definition harmful; and it is an impermissible departure from the *DiGuilio* standard to focus instead on whether reviewing court believes the error deprived the defendant of a fair trial).

The DCA panel below sought to rationalize its departure by concluding the DiGuilio test was an "awkward fit" and that it would be "unproductive" to use it. App'x. 16-17. Davis does not necessarily disagree that it's an awkward fit, though he strenuously disagrees that that observation authorizes the panel to craft a novel, amorphous standard which shifts the burden and is incapable of objective application. [That incapacity might explain why the DCA found it necessary to speculate – inaccurately – about whether Davis' trial and appellate counsel truly believed their client didn't receive a

fair trial. *See* App'x. 27-29.]

The discovery violation cases cited by the panel[5] do not violate the *DiGuilio* standard because they impose a stricter burden on the State as the beneficiary of the error, while the decision below relaxes the harmless error test to the point of flaccidity. The reason why *DiGuilio* may seem an awkward fit is the very reason why the per se reversal rule of *Thompson* makes perfect sense; the error affects the very framework of the trial and potentially every ruling made and action taken by the judge. Its effect on the entire case is profound and unquantifiable. *See Arizona v. Fulminante*, 499 U.S. 279,307-10 (1991). It is not merely an error that occurs during the presentation of the case to the jury, whose harmful impact can be assessed in the context of all the evidence. For that reason, a per se reversal rule is the only effective remedy when, as here, the disqualification error is preserved and properly raised on appeal. *Thompson.*

Assuming arguendo, that disqualification error could in rare cases be shown to be harmless, the State sabotages its own advocacy of the panel's "fair trial" test by asserting that a trial court judgment

[5] *State v. Schopp*, 653 So. 2d 1016,1020 (Fla. 1995); *Scipio v. State*, 928 So. 2d 1138,1150 (Fla. 2006).

"does not "flow from" an error if the error did not contribute to the verdict." SB. 39-40. (Emphasis supplied.) That, of course, is the *DiGuilio* standard, so *DiGuilio* and *Thompson* are compatible. That, however, is not the test the DCA panel employed. Instead, it modified – and relaxed – the harmless error standard, and looked not to whether Judge Harb's presiding over the trial and making dozens of crucial evidentiary and prosecutorial misconduct rulings could have affected the outcome, but only whether it thought the trial was fair. Thus the DCA's novel test is incompatible with *DiGuilio* and *Thompson*.

The State presents a superficially impressive list[6] of nineteen

[6] *Thompson v. Millard Public Sch. Dist. No. 17*, 921 N.W.2d 589,596-97 (Neb. 2019); *Powell v. Anderson*, 660 N.W.2d 107,120–21 (Minn. 2003); *Velardo v. Ovitt*, 933 A.2d 227,237 (Vt. 2007); *Mosley v. State*, 141 S.W.3d 816,838–39 (Tex. Ct. App. 2004); *Heber v. Heber*, 330 P.3d 926,930 (Alaska 2014); *Kay S. v. Mark S.*, 142 P.3d 249,256 (Ariz. Ct. App. 2006); *Harris v. United States*, 738 A.2d 269,280 n.20 (D.C. 1999); *Petzold v. Kessler Homes, Inc.*, 303 S.W.3d 467,473–74 (Ky. 2010); *Tennant v. Marion Health Care Found., Inc.*, 459 S.E.2d 374,387 (W. Va. 1995); *State v. Gardner*, 789 P.2d 273,278 (Utah 1989); *Reilly by Reilly v. S.E. Pa. Transp. Auth.*, 489 A.2d 1291,1300 (Pa. 1985); *Hunt v. State*, 642 So. 2d 999,1054 (Ala. Crim. App. 1993); *People v. McLain*, 589 N.E.2d 1116,1123 (Ill. App. Ct. 1992); *State v. Moyer*, 410 P.3d 71,95 (Kan. 2017); *State v. Williams*, 788 So. 2d 515,527 (La. Ct. App. 2001); *Fidelity Mgmt. & Rsch. Co. v. Ostrander*, 662 N.E.2d 699,706 (Mass. App. Ct. 1996); *Goldfarb v.*

out-of-state decisions. SB. 43-44 at n. 8, 9. The State cites eight of these for applying or endorsing the *Liljeberg* test, while the remainder, according to the State, apply standards which are "materially indistinguishable from the one adopted by the Second District." SB. 43.

Materially indistinguishable? The standard adopted by the DCA panel – which despite its protestations to the contrary (App'x. 24-25) is materially indistinguishable from Justice Boyd's dissent in *Livingston v. State*, 441 So. 2d 1083,1088-90 (Fla. 1983) – directs reviewing courts to comb through the record and transcripts of a jury trial to determine whether the should-have-been-disqualified judge displayed actual bias or otherwise deprived the defendant of a fair trial. Nearly two-thirds of the State's cited cases do not even involve the conduct of a jury trial. *See Thompson* (summary judgment); *Powell* (one judge on appellate panel); *Velardo* (child custody proceedings); *Mosley* (disqualification claim not directed at trial itself, but only to motions for continuance and new trial); *Heber* (custody

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Solimine, 213 A.3d 200,207 & n.5 (N.J. App. Div. 2019); *Sargent Cnty. Bank v. Wentworth*, 547 N.W.2d 753,760 (N.D. 1996); *Welsh v. Commonwealth*, 416 S.E.2d 451,461 (Va. Ct. App. 1992).

modification); *Kay S.* (divorce proceedings); *Harris*, 738 A.2d 269,280 n.20 (disqualification grounds arose post-verdict and before sentencing); *Petzold* (civil bench trial); *Williams* (disqualification issue pertained only to firearm charge on which defendant plead guilty and had no bearing on cocaine trial which took place before the disqualification motion was filed); *Fidelity* (summary judgment); *Goldfarb* (civil jury trial but appellant was not seeking retrial for reasons explained at 213 A.3d 207-09); *Sargent* (order granting bank possession of collateral).

In many of the State's cited cases there was no pretrial (or pre-ruling) motion to disqualify, or the grounds for disqualification arose after the trial or challenged ruling took place. *See Tennant*, 459 S.E.2d at 380-81; *Hunt*, 642 So. 2d at 1051-54; *Powell*, 660 N.W.2d at 112-13; *Harris*, 738 A.2d at 276-77; *Petzold,* 303 S.W.3d at 469-71; *Velardo*, 933 A.2d at 233.

In *Reilly*, 489 A.2d at 1300-01, and *Moyer*, 410 P.3d at 92-93,[7]

[7] In *Moyer*, the statutory basis for recusal was waived for counsel's failure to submit an affidavit, without which the appellate court could not resolve its legal sufficiency. 410 P.3d at 91-95. The code of judicial conduct claim (which was arguably "not intended to create a cause of action for litigants") and the due process claim were rejected

appellate courts found requests for disqualification were waived due to procedural default. In *McLain*, 589 N.E.2d at 1123-24, and *Welsh*, 416 S.E.2d at 459-61, no error was found on the issue of disqualification so any harmless error discussion is dictum at best. Moreover, in *McLain* the conviction was actually reversed for a new trial on other grounds, 589 N.E.2d at 1122, so the harmless error discussion was both gratuitous and moot.

[It is worth noting that the State relies in part on obvious dicta from intermediate appellate courts in Illinois and Virginia, while urging this Court to disregard as dicta its own determination in *Thompson* – integral to the reasoning of the opinion – that while per se reversal is the remedy for disqualification error when properly preserved and raised on direct appeal, actual prejudice must be shown when the claim is raised as one of ineffective assistance by post-conviction motion. SB. 37-40.]

In *Hunt*, 642 So. 2d at 1054, the appellate court disapproved of the judge's improper consultations, but found that no harm occurred where one consultation resulted in the judge receiving advice

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on the basis that the complained-of witness never testified. *Id.*

favorable to Hunt's position (emphasis in opinion), and the other merely involved "the relatively trivial procedural matter of attorney seating arrangements".

None of the out-of-jurisdiction decisions cited by the state resemble the Second DCA panel's convoluted harmless error rationale, and – with a single possible exception – each is plainly distinguishable on its face. Additionally, the controlling law on both judicial disqualification in particular and on harmless error in general in many of those jurisdictions is dissimilar from Florida's. For example, in Massachusetts and Pennsylvania a trial court's ruling on whether or not to disqualify himself is left to the discretion of the trial judge and is reviewed for abuse of discretion. *Fidelity*, 662 N.E.2d at 705; *Reilly*, 489 A.2d 1300. *See also Interest of L.V.*, 209 A.3d 399,415 (Pa. Super. Ct. 2019) ("[W]e extend extreme deference to a trial court's decision not to recuse"). In Florida, in stark contrast, review is de novo, and the trial judge has no discretion to do anything other than disqualify himself when a party's motion asserts legally sufficient grounds. *See, e.g., Reed v. State*, 259 So. 3d 718,721 (Fla. 2018); *James v. Theobald*, 557 So. 2d 591,593 (Fla. 3d DCA 1990)

("Judges have no discretion once the legal requirements have been met.").

The one out-of-state case that may not be as readily distinguishable on its face is Utah's *Gardner* decision. 789 P.2d at 278. However, Utah's harmless error standard for issues of state law is the polar opposite of Florida's. As explained in *State v. Leech*, 473 P.3d 218,228 n. 7 (Ut.App. 2020), in Utah "the State is not required to show that a preserved error was harmless; the defendant is required to show that a preserved error was not harmless." (Emphasis in opinion.) In addition to the shifted burden and the absence of *DiGuilio*'s reasonable doubt standard, Utah goes so far as to conclude that "[b]y placing the burden of persuasion on the defendant, the showing of prejudice required to establish that preserved errors are harmful is indistinguishable from the showing of prejudice required to establish plain error or ineffective assistance of counsel for unpreserved errors." *Id.* (Emphasis supplied.)

It is evident, then, that Utah's law is wholly incompatible with both *Thompson* – whose entire reasoning was based on the distinction between a preserved disqualification error raised on direct

appeal and an unpreserved disqualification error raised as an ineffective assistance claim – and *DiGuilio*. It can also be seen that the difference between "the Second District's fair-trial-before-a-neutral-judge standard and the *DiGuilio* test" is not – as the state would have it – "semantic" or "purely linguistic". SB. 46. The DCA panel's burden-shifting approach may be compatible with Utah law, but not Florida.

And in that regard, consider the State's subtly misleading assertions at the very outset of its brief. The State suggests that the Second DCA found that "Judge Harb was not actually biased," and that Davis "does not dispute that absence of actual bias." SB. 1. Actually, what the DCA panel said was "[w]e do not hold that Judge Harb was in fact biased", and Davis has never contended one way or the other whether the judge harbored actual bias for the simple reason that, absent any overt displays of bias on the trial record, he has no way of knowing. App'x. 10; *See* Davis' Initial Brief ("IB"). 18,24-30. The "neutral judge" prong of the DCA panel's novel harmless error analysis is incapable of proof beyond a reasonable doubt from a cold record, and that may be why the panel improperly

chose to depart from the *DiGuilio* standard.

B. Application of the *Liljeberg* test would require reversal in a trial replete with significant evidentiary rulings.

While neither party nor the lower appellate court are advocating the adoption of the federal *Liljeberg* test, it is nevertheless important to address the state's mistaken impression that it would prevail under that standard. *Liljeberg*, like many of the out-of-state cases relied on by the State, arose under circumstances where neither the judge nor the parties were aware of the conflict of interest at the time of the civil bench trial. Recognizing that judges cannot "disqualify themselves based on facts they do not know" [*see also Petzold*, 303 S.W.3d at 474] the Supreme Court said:

> A conclusion that a statutory violation occurred does not, however, end our inquiry. As in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance. There need not be a draconian remedy for every violation of § 455(a). It would be equally wrong, however, to adopt an absolute prohibition against any relief in cases involving forgetful judges.

486 U.S. 847 at 861-62 (footnote omitted).

Under the totality of the circumstances in that case, the court found "there is a greater risk of unfairness in upholding the judgment

in favor of Liljeberg than there is in allowing a new judge to take a fresh look at the issues." *Id.* at 868.

Similarly, in a number of the cases cited by the state with regard to the *Liljeberg* test application of that test resulted in reversal. *Thompson*, 921 N.W.2d at 596-97; *Powell*, 660 N.W.2d at 119-24; *Velardo*, 933 A.2d at 236-38; *Kay S.*, 142 P.3d at 256-58.

The *Liljeberg* test does not place on the complaining party the nearly impossible (absent overt display of bias) task of proving "actual bias". Rather, the focus is on whether there is an unacceptable risk of injustice, and that can be shown when the judge who should have disqualified himself goes on to make significant discretionary rulings. *See United States v. Orr*, 969 F.3d 732 at 738-42; *Murray v. Scott*, 253 F.3d 1308,1313 n. 8 (11th Cir. 2001); *State v. Salazar*, 898 P.2d 982,987 (Ariz. Ct. App. 1995). Several of the State's cited cases are also instructive. *See Goldfarb*, 213 A.3d at 208 ("federal courts have found it appropriate to vacate … those trial decisions that it would otherwise review for an abuse of discretion"); *Velardo*, 933 A.2d at 238 ("Particularly because we afford such wide discretion to the family court, we cannot determine with any precision the influence of

partiality, if any."); *Kay S.*, 142 P.3d 257-58 ("[Kay] is entitled to have a judge whose impartiality is not subject to question exercise independent judgment in arriving at the determinations of which she complains unless we can determine on appeal that the challenged decisions would have been substantially the same if made by a judge whose partiality was not reasonably subject to question.") (emphasis supplied).

This cogently explains why a criminal jury trial presided over by a judge who should have disqualified himself can rarely, if ever, be deemed "harmless error" under a *Liljeberg* analysis, or any analysis.

To provide needed context, this was a trial where the outcome depended on whether the jury accepted or rejected Davis' insanity defense. That decision turned on the jury's assessment of the opinions of three expert witnesses. All three doctors – two for the state, one for the defense – agreed that the first prong of the insanity defense was established; that Davis was experiencing a psychotic episode and he genuinely believed his actions were necessary to protect his daughter. The point of disagreement was on the second prong. The State's experts believed that Davis' psychotic episode was

caused by his consumption of a small quantity of marijuana before the shootings, and he did not suffer from a mental infirmity, disease, or defect; while the defense's expert concluded that Davis does have a longstanding, mental illness and that that – not the marijuana – caused the psychotic episode.

Among the many matters in which a trial judge exercises broad discretion is the scope and extent of expert testimony *Johnson v. State*, 438 So. 2d 774,777 (Fla. 1983); *Pagan v. State*, 830 So. 2d 792,815 (Fla. 2002). Another area of broad discretion is control of closing argument. *Gonzalez v. State*, 136 So. 3d 1125,1143 (Fla. 2014); *Bush v. State*, 295 So. 3d 179 (Fla. 2020). In Davis' trial the long and complex testimony of each of the three doctors is replete with discretionary rulings (including denial of defense motions for mistrial) made by Judge Harb. The judge correctly declined to instruct the jury that voluntary intoxication is not a defense, because he recognized Davis was not raising such a defense; but then he turned around and – over strenuous objection and motion for mistrial – permitted the prosecutor to read to the jury almost verbatim the same voluntary intoxication instruction he had declined

to give. This enabled the prosecutor to repeatedly and misleadingly imply to the jury that Davis was relying on a legally invalid defense; when in fact the defense's position, supported by expert testimony, was that Davis' use of a small amount of marijuana did not cause him to commit two murders, which were instead the result of a pre-existing mental condition. Cert. Copies of App'l Pprs. 131-152. Other defense objections to prosecutorial misconduct were overruled as well, and Judge Harb denied a motion for mistrial when the prosecutor referred to a defense argument as "a lot of smoke and mirrors". App'l Pprs. 220-28.

Is it possible that the risk of pro-prosecution bias alleged in Davis' disqualification motion contributed, consciously or unconsciously, to Judge Harb's rulings? Obviously if they did, he didn't announce it. The unworkability of the DCA panel's novel harmless error test is further illustrated by the lengths the panel had to go to justify its result. It used a Solomonic "split the baby" rationale to conclude that since Judge Harb also made rulings favorable to the defense there was no "pattern" demonstrating bias. Even worse, the panel saw fit to indulge in inappropriate (and

inaccurate) speculation about Davis' trial and appellate counsel's personal opinions as to whether their client received a fair trial. App'x. 27-29,31. To the contrary, Davis' appellate counsel in the DCA (co-counsel in this Court) vigorously asserted in the briefs and oral argument that several of Judge Harb's rulings – especially but not limited to (1) those concerning the mental health experts, (2) allowing the prosecutor to read to the jury the voluntary intoxication instruction, and (3) denying the defense's motion for mistrial ("smoke and mirrors") and overruling his objection to prosecutorial misconduct (accountability comment) during closing argument – denied Davis a fair trial. App'l Pprs. 131,146,152,222,228. [In forty years of criminal appellate practice, co-counsel Bolotin has never, until now, felt called upon to attest that he personally believes in the legal arguments he makes on behalf of a client. The arguments speak for themselves and the attorney's personal beliefs are irrelevant. However, since the DCA has opened that door, Mr. Bolotin states for what it's worth, as an officer of the Court, that he believes Davis did not receive a fair trial.] The fact that the panel below delved into such matters – driving a wedge between attorney and client – reveals yet

another deficiency in its newly devised harmless error formulation.

As recognized in *United States v. Orr*, 969 F.3d at 739-42, applying the *Liljeberg* test, disqualification error could not be found "harmless" in a trial where the judge made discretionary rulings that were non-routine, significantly aided the prosecution, and were challenged on appeal. "Because of the discretionary calls described above, it is possible that the [trial] court's personal biases influenced the outcome". *Id.* at 741. *See also Murray v. Scott*, 253 F.3d at 1313 n. 8 (citing *Liljeberg*, emphasis supplied) (rejecting Scott's argument that disqualification error was harmless; "[b]ecause of the many rulings by Judge DeMent that pre-dated the summary judgment decision … some of which involved exercises of discretion, we conclude that the harmless error standard is practically unworkable and, thus, inappropriate here.")

C. Reversal for a new trial is required under any recognized standard.

Whether this Court applies a structural error analysis (*Fulminante*), a per se reversal rule (*Thompson*), or Florida's harmless error standard (*DiGuilio*), or even if it adopts – as neither party nor

the court below advocates – the federal harmless error standard (*Liljeberg*), the State cannot show that the disqualification error which in large part it caused [part D, *infra*] and from which it benefitted was "harmless" to Davis. The novel standard crafted for the occasion by the Second DCA panel is amorphous, unworkable, incapable of fair application, and wholly inconsistent with Florida law.

D. The prosecutor's conduct at the June 18, 2015 hearing, which was highly improper and amounted to judge-shopping, compounded the unacceptable risk of bias.

Unlike the Second DCA panel, the State in its brief is just fine with the conduct of prosecutor Hope Pattey, in the presence of Judge Harb, in the June 18, 2015 hearing. In fact, the State seems to think Davis should have been reassured by Ms. Pattey's comments ("Petitioner pressed on despite those assurances.") (SB. 5), and that Ms. Pattey's "rebuttal of the factual allegations in [Davis'] motion" should be taken into account in determining the outcome of his appeal and (in the State's preferred outcome) denying him a new trial. SB. 23.

To the contrary, even the DCA panel understood that Ms. Pattey's behavior was highly improper, and that it made the situation

worse, not better. App'x. 3-5,10-11,31. Her manifest eagerness to have her former colleague preside over Davis' trial (App'x. 31) – when she should have had no dog in the fight (App'x. 3) – and her "plac[ing] in front of Judge Harb information he could not consider when evaluating the disqualification motion" (App'x. 31) compounded the unacceptable risk of bias. [The entire sequence of events – triggered by a State-requested continuance four days before jury selection was scheduled to begin before Judge Jacobsen, due to Ms. Pattey's sudden illness (from which she had recovered by the Monday of the postponed jury selection proceeding), and culminating in her "over-the-top advocacy" in opposing the defense's request that Judge Jacobsen keep the case (App'x. 10) – is set forth in IB. 2-8.]

But for Ms. Pattey's misconduct it is likely Judge Jacobsen, as chief judge, would have kept Davis' case (as he earlier indicated a willingness to do if scheduling permitted), and the disqualification error could have been averted. The State largely caused the error; it got what it wanted and became the beneficiary of the error; and now – instead of conceding reversal under *Thompson* or meeting its heavy burden under *DiGuilio* – it would like to reinvent Florida harmless

error law to deprive Davis of a retrial.

In *Goodwin v. State*, 751 So. 2d 537,546 (Fla. 1999), this Court recognized that one of the important policies furthered by the *DiGuilio* harmless error standard is "providing an incentive on the part of the State, as the beneficiary of the error, to refrain from causing error to occur in the trial of a case." The novel standard invented by the DCA and advocated by the State has precisely the opposite effect.

See also Goldfarb, 213 A.3d at 206 – one of the decisions the State thinks adopts a standard "materially indistinguishable" from the Second DCA's (SB. 8-9) – recognizing that "Judge-shopping – an attorney's attempt to have a particular judge try his or her case – may undermine public confidence in the impartial administration of justice" and (even more importantly in the context of harmless error review) "can influence case outcomes in a way that is unfair to the non-shopping party." In the instant case, in a remarkable example of projection, Ms. Pattey went ballistic[8] at the very thought that Davis

[8] Judge Rothstein-Youakim stated at oral argument "I agree with [defense counsel]'s description of [Pattey] going ballistic." *See* Oral Arg. Video, *Davis v. State*, No. 2D17-517, at 21:28-21:34, https://www.2dca.org/Oral-Arguments/Archived-Oral-Argument-Videos.

might move to disqualify Judge Harb, and she accused him of judge-shopping, when in fact there were legitimate grounds for disqualification (as the DCA recognized) and it was she who was pulling out all the stops to have a particular judge – her former colleague in the state attorney's capital division – try the case.

E. The DCA panel's preference for a writ of prohibition.

When existing law provides a litigant with two procedural options, and does not specify that there will be negative consequences if his attorney elects one as opposed to the other, the client should not be penalized after-the-fact for his attorney's choice of the "wrong" option.

The undercurrent which runs throughout the opinion below is the DCA panel's strong preference that disqualification errors be raised by writ of prohibition. App'x. 12-14,19,27-28. However, as the panel recognized (App'x. 12), under current Florida case law (and that which existed at the time of Davis' pretrial proceedings and trial) there is no requirement to seek an extraordinary writ. *See Leveritt & Assoc., P.A. v. Williamson*, 698 So. 2d 1316,1318 (Fla. 2d DCA 1997) ("A challenge to an order denying a motion to disqualify may be

raised in a petition for writ of prohibition … or it may be raised on direct appeal from the final judgment or order."); *D.H. ex rel J.R. v. Department of Children and Families*, 12 So. 3d 266,272 (Fla. 1st DCA 2009) ("a petition for writ of prohibition is not the exclusive avenue for pursuing relief from the denial of a motion for disqualification"); *Thompson*, 990 So. 2d at 489 (contrasting the "relatively low threshold for obtaining relief on appeal" with the requirement of showing actual prejudice when the issue is raised by post-conviction motion).

It is also worth noting that the DCA's statement that the erroneous denial of a disqualification motion may be reviewed "in one or both of two ways" (App'x. 12, emphasis supplied) is only sometimes true. If a writ of prohibition is denied on the merits (as opposed to an unelaborated denial) that ruling precludes review on direct appeal. *Topps v. State*, 865 So. 2d 1253 (Fla. 2004). In any event, existing Florida law provides two options, and – until the issuance of the panel opinion in Davis' case, five years after his motion to disqualify and four years after his trial – a litigant was not penalized for his attorney's choice of the second option. Now,

however, as a result of the Second DCA crafting its novel, unworkable, burden-shifting harmless error standard inconsistent with all prior Florida law, no competent attorney who wishes to preserve his client's disqualification error would ever fail to move for a writ of prohibition. And that is pretty clearly the DCA panel's intent.

Litigants are entitled to rely on existing law in making decisions and shaping their conduct. *Lemon v. Kurtzman*, 411 U.S. 192,199 (1973); *see also Reich v. Collins*, 513 U.S. 106,110-11 (1994) ("what a state may not do … is to reconfigure its scheme, unfairly, in midcourse – to 'bait and switch' as some have described it") (emphasis in opinion). In *Topps*, at 1258, for example, this Court "emphasize[d] that our holding today will operate only prospectively" in order not to unduly burden the lower courts who had relied on existing law. Surely a litigant in Davis' position – serving a sentence of life imprisonment – who relied on existing law by raising the disqualification issue on direct appeal should be entitled to the same consideration; instead of being harshly penalized for his attorney's choice between two available remedies, and having their motives second-guessed.

Moreover, from Davis' trial attorneys' perspective, prohibition was not the "slam dunk" which the State and the lower appellate court, in hindsight, assume it was. The State now claims that Davis "would have been automatically entitled to relief had he sought a writ of prohibition", and accuses him of "[keeping] reversible error in his back pocket". SB. 1,33. The DCA panel says that if a writ of prohibition had been sought "[w]e would simply have directed that Judge Harb get off the case". App'x. 13-14.

Davis, in 2015 and 2016, could be assured of no such outcome. If he had sought a writ of prohibition – especially in light of Ms. Pattey's furious reaction when the defense even suggested Judge Harb might be disqualified – the State would have opposed it vigorously (and it certainly would not have conceded that Davis was "automatically entitled to relief"). Bear in mind also that Davis's trial took place in 2016 and *Reed v. State*, 259 So. 3d 718 (Fla. 2018) – a decision which strengthened Davis' position on the merits – came out two years later. Finally, the three-judge panel's self-assurance about what it "would simply have" done if only a writ had been sought is practically meaningless in light of the fact that there are 560

potential three-judge panels in the Second DCA.[9]

In addition to the risk of precluding appellate review, there were other significant pitfalls for Davis' attorneys to consider. At the time the State obtained a continuance of the trial set to begin in four days before Judge Jacobsen, at the time of Ms. Pattey's display of anger when the defense requested Judge Jacobsen keep the case, and at the time the motion to disqualify Judge Harb was filed and denied, this was a death penalty case. The filing of a petition for writ of prohibition could have sabotaged potential plea negotiations or hampered defense counsel's efforts to persuade the State to come off death. Importantly, the State never did take death off the table. Instead, one month before trial, it announced that the death penalty would not be sought provided the trial would be completed in October 2016, but the State did not withdraw its notice and it reserved the right - if there were any delays, continuances, mistrials, or other occurrences of that nature – to seek death once again.

So, in light of all the circumstances, Davis' attorneys had ample reason to be wary of further provoking the prosecution during the

[9] William Slicker, *En Banc Hearings, By the Numbers*, Florida Bar Journal(March/April 2021), p. 39.

entire period when negotiations could take place, and to fear potential vindictiveness if it petitioned for writ of prohibition after death was conditionally waived.

Of course, if the law in 2015 and 2016 required filing an extraordinary writ to preserve a disqualification error, then Davis' counsel would have been faced with a tough strategic choice. But the law did not contain such a requirement then, nor does it contain one now. Nor does the DCA panel opinion purport to create such a requirement; it just creates a novel, unworkable, burden-shifting harmless error standard to coerce attorneys in the future to file a writ. Joshua Davis – serving a sentence of life imprisonment – is collateral damage to that end. His trial attorneys cannot be faulted for choosing one of the two available procedural options, and Davis should not be penalized for their choice. If there are sound reasons for changing the available procedures, as the DCA panel evidently believes, that should be done forthrightly, not by the backdoor device of a new "harmless error" test invented for that purpose, and any changes to the procedural options should apply prospectively only.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via the e-filing portal to the following this 10th day of March 2021:

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CERTIFICATION

I certify, as required by Fla. R. App. P. 9.210(a)(2)(B), this document contains 5,706 words (Unopposed Motion to Permit 5,706-word Reply Brief pending), excluding the parts of the document exempted by Fla. R. App. P. 9.045(e). I further certify that this document complies with the typeface requirements of Fla. R. App. P. 9.045(b).

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